TOXIC TORTS AND REGULATORY STANDARDS IN THE LAW OF THE UNITED KINGDOM AND THE EUROPEAN UNION

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TOXIC TORTS AND REGULATORY STANDARDS IN THE LAW OF THE UNITED KINGDOM AND THE EUROPEAN UNION

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I. INTRODUCTION

This Article sets out to examine the variables which tend to influence enforcement of the common law in relation to the so-called "toxic torts" against a background of the public, regulatory standards to

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be found in the law of the European Union and the statutory law of the United Kingdom. The prime reference point is the common law of nuisance and negligence, as well as the interrelationship between nuisance and negligence. The setting of regulatory standards is a further and related concern of this Article, which will draw on various examples of European Union (EU) environmental-law making. Beyond the standard-setting process, attention will be given to the establishment, interpretation, and enforcement of these regulatory standards.

II. ENFORCEMENT OF STANDARDS

At the outset, the critical question is to what extent (if at all) will the court recognize and apply regulatory standards in litigation based on nuisance or negligence or both? There are numerous problems to be considered before any clear view of the variables is possible. These problems are perhaps best represented as questions, as follows: Are the standards contemporary and legally enforceable or merely voluntary and advisory? Are the standards essentially historic? If so, are they appropriate to the contemporary problems thrown up by the litigation? Is there a danger with these so-called "historic" standards that retrospective liability is a possible outcome of litigation? In the case of contemporary statutory requirements, can it be assumed that compliance will give immunity from common law liability? Is there a necessary relationship between a duty of care in negligence and the discharge of regulatory enforcement functions? Finally, what assistance, if any, is to be found in the statutory regulatory framework for the purpose of a decision on causation?

Before these questions can be addressed, it is necessary to look at some of the recent case law. In examining that case law, the objective of course is to identify the courts' treatment of and attitude toward public regulatory standards and limits. Hitherto the common law has often been able only to point to, say, a general freedom to use and exploit unpolluted environmental media.[1] Interestingly, the "older" common law picture is further confused by an insistence that a plaintiff could not complain in a water pollution case "if what the defendants were doing was a natural use of their land."[2] That use may of course have been based on voluntary

1. *See, e.g.*, Lindley L.J. in the Court of Appeals in *Ballard v. Tomlinson*, [1881-85] All E.R. 688, 693 (Eng. C.A. 1885); *cf.* Lord Brett M.R. in the same case, where he refers to the right to appropriate a water source "in its natural state." *Id.* at 691.

2. *See id.* at 692 (Cotton L.J.).

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standards, say, of "good" land management, the theme of the first group of cases.

A. *Voluntary Management Standards*

In many instances, the court will have nothing other than its own view of what is objectively reasonable in a case of negligence or nuisance. In a recent case of public nuisance, *R. v. Shorrock*, the Court of Appeal sought to clarify the requirements for a conviction for public nuisance.[3] Considerable reliance was placed on Lord Wright's judgment in *Sedleigh-Denfield v. O'Callaghan* (a case involving the liability in private nuisance of a landowner to a nuisance created on his land by a trespasser), where he refers to the landowner's *knowledge* of the nuisance *and* his liability "if the nuisance was such that with ordinary care in the management of his property he should have realized the risk of its existence."[4] On other occasions the standards may be those drawn from industry-wide prescriptions, as was the case in *Tutton v. A.D. Walter Ltd.*, where the court held that a farmer owed a duty of care to local beekeepers in applying an insecticide.[5] The bees' presence in the area of the crop was known, but the farmer failed to comply with published recommendations in favor of spraying when the flowers on the crop were dying down.[6] The court held that there had been a breach of the duty of care and that there had been inadequate warning to the beekeepers of the spraying.[7] Interestingly, the judge, Deputy Judge Henry QC, placed the emphasis on the fact that for "the warning envisaged by the code of conduct was a twenty-four-hour warning of spraying . . . [for] basically safe sprays. . . . Dangerous spraying of the kind resorted to would require more notice. . . ."[8] The relevant regulations[9] now incorporate a notice requirement of not less than forty-eight hours for the benefit of beekeepers, but this applies only to aerial applications.[10] Unless specific conditions are set in consents relating to pesticides' use in sensitive areas, it seems likely that common law standards will continue to play a potentially important role.

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3. R. v. Shorrock, [1993] All E.R. 917, 921, [1994] Q.B. 279, 284 (Eng. C.A. 1993).
4. *See id.* at All E.R. 922, Q.B. 285 (quoting Sedleigh-Denfield v. O'Callaghan, 1940 App. Cas. 880, 905).
5. Tutton v. A.D. Walter Ltd., [1985] 3 All E.R. 757, 766, [1986] Q.B. 61, 76.
6. *See id.* at All E.R. 762, Q.B. 71.
7. *See id.* at All E.R. 767, Q.B. 78.
8. *See id.*
9. Control of Pesticides Regulations, 1986 (S.I. 1986 No. 1510).
10. *See id.* at sched. 4(1)(g).

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B. *Common Law Reliance on Regulatory Standards and Limits*

In *Budden v. B.P. and Shell Oil*, the Court of Appeal struck out various claims arising from what was claimed to be the adverse impact on child health of exposure to vehicle emissions in the inner city.[11] The fact that the petrol companies had complied with statutory regulations on the composition of fuel was decisive. However, Megaw L.J. went on to say that "this is not to say that the courts are bound to hold, where a limit has been prescribed in the interests of safety by statute or statutory regulations, that one who keeps within these limits cannot be guilty of negligence at common law."[12]

The encouragement of local authorities' promotion of guide values as a result of European Union air pollution legislation in particular may suggest some circumstances in which there may well be an enforceable duty of care to observe and implement emission limits below formally legislated limits. Guide values are described in a Department of the Environment Circular where it is said that they

> may be used as long term goals although [unlike limit values] they are not mandatory. They can be used in the setting of limits in specially designated zones but there is no requirement for action to be taken where they are exceeded unless zones are designated. The Directive [Directive 80/779 on air quality and smoke and sulfur dioxide emissions] asks that Member States should in the longer term endeavor to move towards these guide values; local authorities should note these objectives and, in those areas where pollution is already below the limit values, may wish to consider whether any further progress towards those guide values is desirable and economically feasible.[13]

Ostensibly, compliance with statutory limits should provide immunity from liability, although it is not always clear precisely why. One analogy at the outset might be the defense of statutory authority. For example, whether liability in nuisance will arise may depend on whether any interference with the use and enjoyment of the plaintiff's land is the

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11. Budden v. B.P. & Shell Oil, [1980] J.P.C. 586.
12. *See id.*
13. Circular 11/81 (Welsh Office Circular 18/81), ¶ 27. Circulars are intended to provide administrative guidance to local authorities and others charged with the task of implementing and enforcing the law.

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"inevitable result" of the exercise of statutory powers justifying a particular function.[14] This analogy is helpful, at least inasmuch as it points to the causation issue in litigation, a matter which is returned to later. For the moment, though, compliance with statutory limits is the basis for a rather bland assumption that such compliance is a prima facie indicator of reasonableness. However, while that bland assumption may be an accepted working rule in tort litigation in the areas of nuisance, trespass, and breach of statutory duty, it is not necessarily acceptable in negligence cases. Nevertheless, it must be conceded that the apparent symmetry of such an argument is confused on those occasions where the litigation relates to nuisance *and* negligence.

It is a well-known common law principle that even though a function is authorized by statute, a negligent exercise of that function will attract tortious liability. The same parallels can be drawn in relation to regulatory controls.[15] In the Canadian case of *Willis v. F.M.C. Machine and Chemicals Ltd.*, for example, the court was confronted by a pesticide that had been approved under statutory procedures, but it found the manufacturer liable in negligence following damage to a crop of turnips to which the product had been applied.[16] In an *obiter* statement, Nicholson J. did not think that federal approval "carr[ied] with it any presumption of no negligence by the manufacturer."[17] Furthermore, "[t]he federal authorities may also have been negligent in granting registration to a product before sufficient trial experiment has been conducted."[18]

Three further cases merit attention in this section. The first case is *Cambridge Water Co. v. E. Counties Leatherwork Plc.*, where the Court of Appeal was confronted by facts indicating that a statutory water company had purchased a site containing a bore hole from which water could be pumped from a chalk aquifer.[19] Initially the water from the bore hole was declared to be wholesome by reference to water-quality standards then extant.[20] However, following entry into force of the European Directive 80/778, the water was tested and showed concentrations of organochlorines including tetrachloroethane, a dry-

14. *See* Allen v. Gulf Oil Ref. Ltd., [1981] All E.R. 353, 367 (H.L. 1981).
15. Dutton v. Bognor Regis U.D.C., [1972] 1 All E.R. 462, 363 (Eng. C.A. 1971).
16. Willis v. F.M.C. Mach. & Chems. Ltd., 68 D.L.R.(3d) 127, 128 (1976).
17. *See id.* at 157.
18. *See id.*
19. Cambridge Water Co. Ltd. v. Eastern Counties Leatherwork Plc., [1994] 1 All E.R. 53 (H.L. 1993) (based on strict liability issues only).
20. *See id.* at 55.

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cleaning solvent much used in the tanning industry for degreasing sheepskins.[21] The concentrations discovered were well in excess of the limits permitted by the Directive and the regulations transposing them.[22] Thereupon pumping was stopped, and the appellant claimed that the organochlorines had originated in the respondent's industrial premises.[23] An injunction and damages were sought in respect of the groundwater pollution which had prevented pumping for the purpose of providing a public water supply.[24] Although the decision was reversed in the House of Lords by reference to strict liability principles,[25] the Court of Appeal held that insofar as the interference with public water supply was an actionable nuisance, the liability was strict so that there could be liability for "any" damage.[26] In so holding, the Court of Appeal refused to attach any importance to the fact that the appellant suffered loss only when quality standards were raised under the influence of the European Community three years after abstraction and many years after the respondent had ceased to spill organochlorines.[27] The Court of Appeal had no doubt that, prima facie, wholesomeness of water depends on compliance with European Union water quality standards,[28] even though there may be other factors that are influential in such judgments.[29]

The second case is *Margereson and Hancock v. J.W. Roberts Ltd.*, where the plaintiffs claimed damages for personal injury together with consequential losses caused by adverse exposure to asbestos dust generated by the defendant's factory.[30] The plaintiffs lived in close proximity to the factory over a varying period of fifty years.[31] Neither party worked in the factory, nor did they work elsewhere in contact with asbestos, but both parties contracted mesothelioma.[32] The factory used a particularly toxic form of asbestos, chrysolite.[33] In this context, a variety of statutory regulations applied to the factory's industrial processes, but

21. *See id.* at 55-56.
22. *See id.* at 56 (citing Water Supply (Water Quality) Regulations 1989 (S.I. 1989 No.1147)).
23. *See id.*
24. *See id.* at 56-57.
25. *See id.* at 78.
26. *See id.* at 61.
27. *See id.*
28. *See id.* at 55.
29. *See, e.g.*, McColl v. Strathclyde Regional Council, (1984) J.P.L. 350; Read v. Croydon Corp., [1983] 4 All E.R. 631, 650-53.
30. Margereson v. J.W. Roberts Ltd. (C.A. 1996), *cited in* THE TIMES, April 17, 1996.
31. *See id.*
32. *See id.*
33. *See id.*

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evidence before the court suggested that the company had failed to comply with those regulations.[34] The claim before the court was based on negligence, nuisance, and strict liability.[35] Only the negligence claim was pursued.[36] At first instance the court held that the statutory regulations governing the processes involving asbestos indicated the company's awareness of its dangers to workers and indicated, in turn, that the company should have reasonably foreseen the adverse impact of the dust on those living in close proximity to the factory.[37] It was not necessary, the court held, that the company should be aware of the *precise* effects; the only requirement is that such a defendant should reasonably foresee damage to human health.[38] On that basis, the company was liable to the third parties in respect of the historic contamination.[39] In upholding this decision, the Court of Appeal stressed that liability would attach only if the evidence demonstrated that the defendants should reasonably have foreseen a risk of *some* pulmonary injury, not necessarily mesothelioma.[40] Furthermore, the information that should have operated on the defendant's corporate mind was in existence long before Margereson was born in 1925.[41]

The third case is *Graham v. Re-Chem International Ltd.*, which is worthy of comment if only because it was said to represent the longest single piece of continuous civil litigation in English legal history, running for 198 days and 896 hours in court.[42] Mr. Graham, a farmer, is also reported to have been under cross-examination for twenty-seven days.[43] The central issue in the case was a claim that Re-Chem's incinerator had poisoned the Grahams' dairy herd. The case was argued on the basis that PHAHs (PCBs, dioxins, and furans) from the incinerator had caused the poisoning.[44] The Grahams argued to the satisfaction of the judge that it was not necessary to prove that the emissions were the sole or even the

34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. Graham v. Re-Chem Int'l Ltd., [1996] Env. L.R. 158 (Q.B.), *available in* LEXIS, Intlaw Library, Engcas file.
43. *See* Patrick Matthews, *Environment: Death on the Farm*, THE GUARDIAN, June 7, 1995 at sec. 4.
44. *See Graham*, [1996] Env. L.R.

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dominant cause of the injuries to the cattle.[45] It was enough to show, on a balance of probabilities, that they had materially contributed to that injury.[46]

Much of the judgment was devoted to rejecting the causal link with PHAHs.[47] The judge pointed to a lack of knowledge on the part of the farmers as a result of which they fed the animals incorrectly, so inducing "fat cow syndrome."[48] Perhaps significantly there was no evidence of similar cattle problems on land surrounding the plaintiffs' farm.[49] Although the incinerator had caused a local nuisance, this, according to the judge, was a long way from a conclusion that significant quantities of dioxins and furans had been released.[50] The judge also pointed to evidence that inefficiency of operation of the incinerator had left deposits in the immediate locality. Interestingly, the judge, Forbes J., emphasized the role of the regulatory agency and the authorization under which the incinerator was operated, but not by reference to any particular ceiling to which common law liability could be related.[51] The authorization was referable to BPM (best practicable means). The judge observed that

> despite . . . various relaxations of the BPM . . . limit, the particulate emission from the . . . plant was continually in excess of [the regulator's] requirements, often by substantial margins . . . the fact that [the regulator] permitted the plant to operate in excess of the stipulated levels can only be properly explained by the [fact that the] plant had been built to a less stringent particulate emission limit and [the regulator was] allowing a period of grace for upgrading . . . [the regulator] must have formed the view that the high particulate emission levels, although industrially unacceptable, did not pose a hazard to the environment; otherwise it would have been their clear duty to shut the plant. . . . There is no doubt that Re-Chem was unable to control the particulate emission levels from the . . . plant so as to comply with the limits

45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*

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> required by [the regulator], despite the fact that those limits were relaxed throughout what was probably a 10 year period of grace.... In my judgment, it is clear that [the regulator] would not have acted in this fashion, if the continued operation of the incinerator had been perceived as presenting a risk of significant environmental damage. I accept the submission that the fact that [the regulator] did permit its continued operation does suggest that the incinerator did not actually present such a risk...[52]

C. *Planning Consents as a Base-Line for Nuisance Liability*

Recent case law addresses the question of the relationship between liability in nuisance and the grant of a planning consent under the Town and Country Planning Act 1990.[53] In *Gillingham Borough Council v. Medway (Chatham) Dock Co.*, it was held that a grant of planning permission is analogous to statutory authority to change the character of a locality so that noise (for example) is no longer extraordinary.[54] Accordingly, in an action for nuisance, liability will be determined by reference to the circumstances obtaining *after* the completion of the subject development. Subsequently this approach has been doubted by the Court of Appeal in *Wheeler v. J.J. Saunders Ltd. and Another*, where the planning permission related to the construction of two pig-weaning houses.[55] In the *Gillingham* case, the planning permission had related to the reopening of a dockyard complex at Chatham.[56] However, in dealing with a case of nuisance by smell, it was said in *Wheeler* by Staughton L.J. "that if this were a case where the buildings were authorized by statute, there would be immunity from any action based on nuisance. But ... the case may be different where one is concerned with planning permission rather than statute."[57]

Elsewhere, Peter Gibson L.J. was not prepared "to accept that the principle applied in the *Gillingham* case must be taken to apply to every planning decision. The Court should be slow to acquiesce in the extinction of private rights without compensation as a result of

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52. *See id.*
53. Town and Country Planning Act, 1990 (c 8).
54. Gillingham Borough Council v. Medway (Chatham) Dock Co., [1992] 3 All E.R. 923, 934-35, [1993] Q.B. 343, 359-61 (1992).
55. Wheeler v. J.J. Saunders Ltd., [1995] 2 All E.R. 697, 700.
56. *See Gillingham*, [192] 3 All E.R. at 933.
57. *See Wheeler*, [1995] 2 All E.R. at 706.

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administrative decisions which cannot be appealed and are difficult to challenge."[58]

Subsequently, in *Hunter v. Canary Wharf Ltd.*, Pill L.J. also addressed the approach adopted by Buckley J. in the *Gillingham* case, as follows:

> If . . . Buckley J was deciding the case on the basis that where planning consent for a development is given and implemented, the question of nuisance will thereafter fall to be decided by reference to a neighborhood with that development and not as it was previously, I have no difficulty with it. The changed character of the area may render innocent the nuisance. If . . . Buckley J was purporting to broaden the defence of statutory authority so as to include the authority conferred by a planning permission under delegated powers, I have respectfully to disagree.[59]

It is clear, therefore, that a fundamental distinction exists between a mere administrative act (the granting of a planning consent) and a legislative act (the granting of statutory authority). Accordingly, there will be statutory authority in respect of anything which is the inevitable consequence of the authorized activity.[60] If, therefore, the prescriptions and requirements of a planning consent, say, for an industrial development overlap with pollution controls, there is at least the potential for some interesting public-law standard and even limit-setting for the purpose of nuisance liability. However, in the U.K., local planning authorities are strongly dissuaded from using planning consents as a means of exerting control over polluting processes, although the division between each area of control is not always easy to see.

The Royal Commission on Environmental Pollution has observed that

> [I]n deciding applications for industrial development and especially for [prescribed processes under Part I of the Environmental Protection Act relating to air pollution control] local planning authorities sometimes impose planning conditions designed to control air pollution from the plant, even though separate legislation exists for that

58. *See id.* at 711.
59. Hunter v. Canary Wharf Ltd., [1996] 1 All E.R. 482, 492 (Eng. C.A. 1995).
60. Allen v. Gulf Oil Ref. Ltd., [1981] 1 All E.R. 367 (H.L. 1961).

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> purpose. This practice is misguided.... It is also confusing and potentially counterproductive in practice: conditions identical to those imposed by the pollution control authority serve no useful purpose in the short term but, because planning conditions cannot be updated, could in the long term undermine the pollution control authority's work in seeking progressive improvements in control.... If the planning conditions are less stringent than the pollution control requirements then the developer is given an argument against those requirements. The pollution control requirements are likely to be set close to the best the plant can physically achieve: it is therefore unlikely that any more stringent requirements imposed as planning conditions could be regularly met. If the planning authority, using air quality guidelines, consider that an unacceptable amount of pollution is likely to be emitted from a proposed plant when the [enforcing authority's] requirements have been set their sanction should be the refusal of planning permission not the imposition of planning conditions designed to control emissions.[61]

There are few examples of pollution-control requirements finding their way into a planning consent.[62]

D. *Tortious Liability and Regulatory Responsibilities*

The common law is evidently shaped by other factors arising from the discharge of regulatory responsibilities both by the environmental regulator and the regulated. Again in recent litigation in the U.K., the case of *Losinjska Plovidba v. Transco Overseas Ltd. (The Orjula)* stands out, even though it is not strictly a case involving toxic torts as such.[63] The decision of the High Court does say some interesting things about tortious liability for environmentally dangerous substances. The facts show that a charterer leased containers to a third party for use in the transportation of drums of acid being shipped to Libya, via Rotterdam.

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61. Royal Comm'n on Envtl. Pollution, Fifth Report (1976), para. 357.

62. *See* Ferro-Alloys and Metal Smelter [1990] L.M.E.L.R. 176 (a decision of the Secretary of State for the Env't); *cf.* Gateshead Metro. Borough Council v. Secretary of State for the Env't, 71 P. & C.R. 350, [1995] Env. L.R. 37 (1994), [1994] 1 P.L.R. 85, [1995] J.P.L. 432.

63. Losinjska Plovidba v. Transco Overseas Ltd. (The Orjula), [1995] 2 Lloyd's Rep. 395 (Q.B. 1995).

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On arrival in Rotterdam the containers were found to be defective, whereupon the charterer was required by the port authority to unload and decontaminate the containers. It was held by the High Court that the charterer of the vessel had an independent cause of action in tort.[64] In view of the fact that increasingly strict statutory controls now characterize many dangerous or environmentally intrusive substances, facilities for abandonment or disposal are now severely curtailed. Prominent examples in the United Kingdom occur in relation to waste management and the management of agricultural sludge which is to be spread on land.[65] In these, and no doubt many other, circumstances the present decision appears to provide the person in possession of defective or dangerous substances with an action against the supplier or transferor. This has interesting possibilities and raises the prospect of actions in tort against, say, the producer of waste at the instance of a transporter where through a misdescription the landfiller refuses to accept the consignment. Another example would relate to agricultural sludge where the sludge supplied by one farmer to another is found (contrary to the recorded characteristics) to contain traces of heavy metals beyond the statutory limit found in E.C. Directive 86/278.[66] In both these examples, civil liability will be additional to any criminal liability.

The variable characteristics of statutory regulatory requirements and responsibilities as seen by the court will determine whether tortious liability attaches to the regulator. A leading case is *Murphy v. Brentwood District Council*, where the court was concerned with the alleged negligence of a local authority in the discharge of its functions and responsibilities relating to building control under the Building Act 1984 and the Building Regulations.[67] The legislation was seen by the court as being concerned with physical health and safety, so that anything other than physical injury to the plaintiff attributable to a regulatory failure by the local authority is unlikely to attract liability in negligence.[68] In particular the court considered that, in the absence of reliance by the plaintiff, damages for economic loss will not be available,[69] e.g., where

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64. *See id.*

65. *See* Environmental Protection Act, 1990; Sludge (Use in Agriculture) Regulations 1989 (S.I. 1989 No. 1263).

66. Directive 86/278/EEC, 1986 O.J. (L 181).

67. Murphy v. Brentwood Dist. Council, [1991] App. Cas. 398, 435-36, 2 All E.R. 269 (H.L. 1991).

68. *See id.* at 481-82; *cf.* Tesco Stores Ltd. v. Wards Constr. (Inv.) Ltd., 76 B.L.R. 94.

69. As to the principle of reliance, see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] App. Cas. 465, 504 (H.L.). In a recent decision, *Welton v. N. Cornwall Dist. Council* (140

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there is difficulty in selling a house in which defects are attributable to a regulatory failure by the local authority.

In the same vein, the court is likely to require some sufficient proximity between the plaintiff and the local authority by reference to the apparent objectives of the statute before finding a duty of care. In the Scottish case of *Armstrong v. Moore*, the Outer House found no sufficient proximity between the local authority and the pursuers as proprietors of an adjacent building affected by the condition of another building, the construction and completion of which was within the statutory building-control powers of the authority.[70] This conclusion, it was held, can be sustained even where defects in a new building are or ought to be known to the authority and are such that damage to the pursuers' property or health is foreseeable.[71]

Whether a regulatory agency has a positive duty to act appears to depend on the public nature of its powers, duties, and funding, according to the House of Lords in the recent case of *Stovin v. Wise, Norfolk County Council (Third Party)*.[72] Lord Hoffmann stressed that "a public body is in principle liable for torts in the same way as a private person."[73] Whether there is a positive duty in tort requiring a regulatory agency to act will clearly depend on matters such as proximity between the parties.[74] Whether a statutory duty gives rise to a private cause of action is a matter of construction, taking into account statutory policy and whether it was intended to confer a right of compensation for breach.[75] Lord Hoffmann went on to contrast a statutory duty as a possible basis for a duty of care and concluded that this is not exactly a question of construction, mainly because the cause of action does not arise out of the statute itself.[76] Nevertheless, here too the policy of the statute is crucial. Lord Hoffmann and the majority of the House of Lords considered that the minimum preconditions for founding a duty of care on the existence of a statutory power (if indeed the nexus can be established at all):

S.J. L.B. 186, *cited in* THE TIMES, July 19, 1996), the Court of Appeals confirmed an award of damages against a local authority in favor of a guest house owner who had suffered economic loss caused by the negligence of an environmental health officer who had incorrectly stipulated, upon threat of closure, costly building works in order to comply with the Food Safety legislation.

70. Armstrong v. Moore, 1996 S.L.T. 690.

71. *See id.*

72. Stovin v. Wise and Norfolk County Council (Third Party), [1996] 3 All E.R. 801, 828, [1996] 3 W.L.R. 388, 415, *cited in* THE TIMES, July 26, 1996.

73. *See id.* at All E.R. 821, W.L.R. 408.

74. *See id.* at All E.R. 822, W.L.R. 409.

75. *See id.* at All E.R. 825, W.L.R. 412.

76. *See id.* at All E.R. 827, W.L.R. 414.

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> are first, that it would in the circumstances have been irrational not to have exercised the power . . . [suggesting] a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.[77]

It is clear from tort litigation in the U.K. that the success of an action for breach of statutory duty is a rare event indeed. It has been said by the House of Lords that such an action *might* arise if it could "be shown . . . that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty."[78] In the same proceedings the House of Lords showed great reluctance to develop a duty of care from a statutory duty particularly by reference to the policy of avoiding interference with a discretion properly given to a public regulatory agency.[79]

Finally, in this section it is necessary to address the idea of supplementary common law protection even though regulatory standards have been met. There is authority for the proposition that even though such standards are satisfied, there may be an enforceable duty of care imposed. This appears to apply to those individuals or organizations who have a duty to comply with prescribed environmental standards and limits. For example, even if water is not unwholesome, a water undertaker or other private supplier may be subject to a duty of care. If, for example, water supplied becomes poisonous on the consumer's premises because of its passage through lead pipes, the undertaker may be liable in negligence for failure to warn of the consequences of consumption. In these circumstances it has been said that "the plaintiffs . . . [are] entirely dependent upon the supplier of the water to see that it [is] water which [is] not in its nature poisonous."[80]

E. The Problems of Causation

Establishing causation on the balance of probabilities is clearly a complex process. That complexity is seen in a crude matrix that shows,

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77. *See id.* at All E.R. 828, W.L.R. 415.

78. *See* X (Minors) v. Bedfordshire County Council, [1995] 3 All E.R. 353, 364 (H.L. 1995), [1995] 3 W.L.R. 152, 166.

79. *See id.* at All E.R. 371, W.L.R. 172-73.

80. Barnes v. Irwell Valley Water Bd., [1938] 2 All E.R. 650, 659 (C.A.) (Slesser L.J.); *cf.* Scott-Whitehead v. National Coal Bd., 53 P. & C.R. 263, 2 E.G.L.R. 227 (Q.B. 1985).

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at one level, a process which may be conducted before the court in isolation rather than being based on, say, a series of epidemiological studies. At another level there is the traditional clash between the scientific standard of proof (the so-called ninety-five percent proof requirement) and the legal standard (the so-called fifty-one percent approach, based on the balance of probabilities). One commentator has observed that "epidemiologists rarely, if ever, reach firm conclusions based on results from single studies."[81] The luxury of even a single study is often not available to the court, although it is clear that proof on the balance of probabilities is not necessarily a very exacting task. Even if the court has the benefit of just one study it may additionally adopt a normative framework based on further scientific study as a means of putting any study to the test.[82]

At a third level it is clear that the common law is unable to rely on any statutory definition of causality. In looking at this level of the matrix one finds (presumably) a set of statutory conclusions or even presumptions about the potential harmfulness of prescribed environmental pollutants. In other words, it has to be assumed that the legislators have crystallized the work of the scientists. From this point on, it is up to the court to draw its inferences and conclusions from the available evidence.

At a fourth level of the matrix, it is important to disentangle the investigation of causation according to whether liability issues are at stake, as opposed to the issue of damages and their calculation. At a fifth level, the matrix is further confused by seemingly different approaches to the requirements for causation. This latter element deserves further analysis by reference to recent toxic tort litigation.

In *Jackson v. Tilling Construction Services, Ltd.*, the court was concerned with the impact of calcium dust from kilns operated adjacent to a farm.[83] Taylor J. in the High Court concluded that under each of the four heads of damage, the calcium dust was a *major* cause of the problems suffered by the plaintiff farmer.[84] The judge added that "when one considers their coincidence in time with each other and with the

81. JOSEPH V. RODRICKS, CALCULATED RISKS: UNDERSTANDING THE TOXICITY AND HUMAN HEALTH RISKS OF CHEMICALS IN OUR ENVIRONMENT 127 (1992).

82. *See* Reay v. British Nuclear Fuels Plc., [1994] Env. L.R. 320 (Q.B. 1993), *cited in* THE INDEPENDENT, Oct. 18, 1993, where such an approach was adopted.

83. Jackson v. Tilling Constr. Servs., Ltd., 75 J. No. 292 (Q.B. 1983).

84. *See id.*

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increased pollution, the evidence is very strong."[85] That evidence was of course collected with the assistance of an expert, and other evidence was before the court.

In an Irish case, *Hanrahan v. Merck Sharp and Dohme*, the approach to the issue of liability is expressed quite blandly from evidence about which the judge, Henchy J., seems to have been unequivocally clear in the plaintiff's favor, the plaintiff being another farmer whose farm and his own health were adversely affected by emissions from a nearby factory.[86] Henchy J. concluded that he would "allow the appeal against the finding that the plaintiffs had not established as a matter of probability that the complaints about the condition of the cattle were not causally linked to toxic emissions from the defendants' factory."[87]

In the case of *Graham*, again on similar facts involving a plaintiff farmer and emissions from a nearby incinerator, the judge, Forbes J., seemed to be rather more thorough.[88] For whatever reason, it appears that there was a far more thorough investigation of causation in all its ramifications, compared with the approach in the two earlier cases. Ultimately, Forbes J. held that it would be sufficient to establish that the alleged emissions caused or materially contributed to the ill health of the plaintiff's cattle, and that it was unnecessary to show that the incinerator emissions were the dominant cause of the injury suffered.[89] Interestingly, it appears that the apparent retreat from the dominant-cause approach eases the challenge of establishing causation on a balance of probabilities.

III. SETTING THE REGULATORY STANDARDS

This section of the Article looks at European Union norms and standards, their purpose and appropriateness for the purposes of the common law, the absence or (in some cases) the multiplicity of standards, the influence of the polluter-pays and precautionary principles, the derivation and transposition processes through which direct standards are admitted to the statute law of the United Kingdom, and (finally) the admission of indirect standards into the law, by reference to which the common law may interact in litigation.

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85. *See id.*
86. Hanrahan v. Merck Sharp & Dohme, 1982, No. 2138 P. 1985 No. 316, [1988] I.L.R.M. 629.
87. *See id.* at [1988] I.L.R.M. 645.
88. Graham v. Re-Chem Int'l, Ltd., [1996] Env. L.R. 158 (Q.B.).
89. *Id.*

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A. *EU Norms and Standards*

While this Article does not set out to examine the treaty base for environmental policy implementation in the European Union,[90] it does seek to identify the existence of any meaningful relationship between EU legislative requirements and enforcement of the common law. At the outset, it may be asked what the common law might expect here, for example, in seeking to conclude what is, say, reasonable air or water quality. Arguably, only a limited answer to that question has emerged from the foregoing sections of this Article, particularly in the context of so-called "limit" and "guide" values already referred to.

Above all it must be borne in mind that EU Directives serve particular purposes, a crucial variable in any attempt to make them "use-friendly" where the common law is concerned. Two examples may suffice for present purposes. In the first place, Directive 75/440 on the quality required of surface water intended for drinking water abstraction has two essential objectives.[91] The Directive specifies the "physical, chemical, and microbiological characteristics" which surface waters must have for present purposes.[92] Furthermore, the Directive defines the methods of treatment to enable surface water to be transformed into drinking water, dividing surface water into three categories according to limit values corresponding to the appropriate standard methods of treatment necessary to transform that category of water into drinking water.[93] The second example is drawn from Directive 92/72 on air pollution by ozone.[94] The Directive is concerned with the harmonization of procedures for monitoring, for information exchange, and for informing and warning the population in connection with ozone pollution.[95]

The two examples just described show plainly the varying and differing purposes for which environmental directives are legislated, making it difficult and even impossible on occasions to relate these legislative requirements to the process of finding liability benchmarks in common law toxic tort litigation. If this detailed analysis is unreliable, are there possibilities to be seen in the application of the doctrine of "direct effect"? Where it is said that a Community measure has direct effect, that

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90. *See, e.g.*, LUDWIG KRAMER, E.C. TREATY AND ENVIRONMENTAL LAW (2d ed.) (1995).
91. Directive 75/440/EEC, 1975 O.J. (L 194/26).
92. *Id.* at art. 4.3.
93. *Id.* at art. 2.
94. Directive 92/72/EEC, 1992 O.J. (L 297/1).
95. *See id.*

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measure will permit an individual to enforce it as long as the measure in question is clear and precise, unconditional, and requires no further action for implementation by a member state.[96]

Directly effective provisions will operate only "vertically" against the State, but not "horizontally" against another individual.[97] Consequently, an important inquiry here is whether a particular organization or agency is sufficiently well identified with the State.[98] Because of these constraints, the European Court of Justice "has attempted to provide alternative means of securing the effective application of Directives, notably via the principle of indirect effect and the principle of state liability in damages for breaches of Community law."[99]

As a result of two seminal cases before the Court, it "fell to the courts of member states to *interpret* national law in such a way as to ensure that the objectives of the Directive were achieved. In this way EC law could be applied indirectly, by way of interpretation, even if it was not directly effective."[100]

Furthermore, the Court has now extended State liability without reference either to direct effects or indirect effects. The Court has held that in certain circumstances, a state may be liable to make good damage to individuals caused by a breach of Community law for which it is responsible.[101] Three conditions have to be satisfied: (1) the Directive must confer rights for the benefit of individuals, (2) the content of those rights must be determined by reference to the provisions of the Directive, and (3) there must be a causal link between the breach of the state's obligation and the damage suffered by the person affected. Any breach of Community law must, however, be "sufficiently serious" where a national legislature is responsible for such breaches.[102] A breach will be sufficiently serious where, in the exercise of legislative powers an institution or member state "manifestly and gravely" disregards the limits

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96. *See* Case 26/62, Van Gend en Loos v. Nederlandse Tariefcommissie, [1963] C.M.L.R. 105, 112.

97. *See* Case 152/84, Marshall v. Southampton & South West Area Health Auth. (Teaching), [1986] 1 C.M.L.R. 688, 711.

98. Griffin v. South West Water Servs. Ltd., [1995] I.R.L.R. 15 (C.A.).

99. JOSEPHINE STEINER, ENFORCING EC LAW 19 (1995).

100. *See id.* (citing Case 14/83, Van Colson v. Land Nordrhein-Westfalen, [1986] 2 C.M.L.R. 430; Case 79/85, Harz v. Deutsche Tradax GmbH, [1986] 2 C.M.L.R. 430, 431).

101. *See* Cases C-6/90 & 9/90, Francovich v. Italian State, [1993] 2 C.M.L.R. 66, 86.

102. Cases C-46/93 & C-48/93, Brasserie du Pecheur SA v. Federal Republic of Germany; R. v. Secretary of State for Transp., *ex parte* Factortame Ltd. (No.4), [1996] 2 W.L.R. 506, 594-96.

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affecting the exercise of powers. Factors to be taken into account here will include the clarity and precision of the rule breached.[103]

Even if it could be said that direct effects routinely emerge from the provisions of EU environmental directives, this would not necessarily suggest an automatic benchmark for common law liabilities. Nevertheless, the court may regard, for example, limit values and monitoring requirements as being indicative of what is reasonably and commonly accepted in the Union, as a basis for nuisance liability, strict liability, and in particular for negligence liability. However, it has been shown above that the emphasis of EU legal requirements is on public rather than private obligation. That central distinction is not necessarily critical, though, so that conceptually the common law should not necessarily have any difficulty in finding liability where the defendant's activities have intervened to affect adversely the quality of a particular environmental medium as determined by the relevant Directive.[104]

B. *The Absence or Multiplicity of Standards*

The absence of any standards, limits, or norms in EU legislation obviously leaves the common law with freedom to choose from other approaches in determining the outcome of a case. The Directive dealing with the disposal of polychlorinated biphenyls (PCBs) and terphenyls and restrictions on the sale and use of the former[105] show that there are no explicit requirements making it mandatory to dispose of PCBs in line with EU Directive requirements.[106] As a result "[t]here is no British legislation preventing someone holding a quantity of waste PCBs on his premises (for example) in an old transformer which may begin to leak until an occupational hazard is posed."[107]

A multiplicity of standards is likely to be a rare occurrence except, perhaps, in transitional situations where pre-existing national standards co-exist with EU requirements until transposition into national law takes place. A particularly pressing problem relates to pre-existing standards, limits or norms in national law that are more rigorous than EU requirements. This is a problem that has been clearly manifested recently

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103. R. v. H.M. Treasury, *ex parte* British Telecomms. Plc., [1996] 3 W.L.R. 203, 232-33.

104. *See supra* notes 13, 21 and accompanying text.

105. Directives 76/403/EEC, 1976 O.J. (L 108); 76/769/EEC, 1976 O.J. (L 262); 85/467/EEC, 1985 O.J. (L 269).

106. *See* Directive 76/403/EEC, 1976 O.J. (L 108).

107. NIGEL HAIGH, MANUAL OF ENVIRONMENTAL POLICY: THE EC AND BRITAIN 5.6-4 (1993).

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with the accession to EU membership of certain Scandinavian countries. In the case of another Scandinavian country, Denmark, that acceded to membership earlier, the European Commission allowed a ban by that country on pentachlorophenol (PCP), thus allowing legislation that is more stringent than EU legislation.[108] The Treaty provides that a member state may take measures going further than EU law by reference to "major needs" as long as those measures do not practice "arbitrary discrimination" or a "disguised restriction on trade."[109] However, such national measures do require Commission approval. The major need cited by Denmark is the incidence of PCP in groundwater, ninety-eight percent of which contributes to Danish drinking water requirements.[110] The Commission, in giving approval, also recognized the need for protection against further PCP pollution and concluded that, because PCP is no longer produced in the Union, there will be minimal effects on trade.[111] One commentator has asked the question "whether the Commission would take the same approach to a national law which was introduced later than an EC law, and whether only those Member States which voted against the EC law—as Germany and Denmark did with the PCP Directive—would be allowed to have stricter national measures."[112]

C. *The Influence of the "Polluter Pays" and Precautionary Principles*

The first European Community Action Programme on the Environment contained, *inter alia*, two important policies.[113] The first, referred to as the precautionary principle, stipulates that prevention of pollution is better than cure; the ultimate aim of any environmental policy must be the elimination of pollution at its source.[114] The second policy, known as the polluter-pays principle, is that the person who causes pollution must bear the cost of preventing, eliminating, or reducing it.[115] There can be little doubt that the second element here is likely to be closer to the concerns of the court seeking to enforce the common law in toxic

108. *See* 96/211/EEC, 1996 O.J. (L 68/32).

109. *See* Treaty Establishing the European Community, Feb. 7, 1992 [1992] 1 C.M.L.R. 573, art. 100a(4).

110. *See Citing Special Concerns on PCP, Commission Approves Danish Ban of Substance,* 19(7) Int'l Envt'l Rep. (BNA) 230 (April 3, 1996).

111. *See id.*

112. 254 ENDS Report 49 (March 1996).

113. 1973 O.J. EUR. COMM. (C 112).

114. *See id.*

115. *See id.*

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tort litigation. Insofar as this principle appears to suggest some presumption of strict liability, there is telling evidence from the English courts to the effect that such a matter is best left to Parliament.[116]

Otherwise, in the case of the precautionary principle, the Court of Appeal has held that the precautionary principle is not binding on Ministers making environmental policy in the United Kingdom.[117] The proceedings arose from residents' concern about the potential health problems stemming from electromagnetic fields created by overhead power cables.[118] Section 3 of the Electricity Act, 1989, imposes on the Secretary of State a general duty to secure the public's protection from dangers arising from, *inter alia*, the transmission of electricity and empowers the making of regulations for this purpose.[119] Regulations as made in fact contain no provision for protection from the alleged effects of electromagnetic fields.[120] The court concluded that, in the absence of evidence of adverse health impacts, there is no legal obligation to make provision through regulations here.[121] It was held that the precautionary principle relates to the making of policy at the European Union level. Accordingly, there would be a legal obligation to incorporate the principle if relevant law and policy is decided upon at Council level and then directed at member states for implementation. That had not happened. In these circumstances, therefore, the court would be free to recognize or reject such a principle or even adapt it according to the law and facts before it in toxic tort litigation. The nature of such litigation, assuming that it is free of any concern for the enforcement of a Directive, would normally suggest no obligation to recognize the principle as such. Nevertheless, it is likely that the precautionary principle would, albeit generally, influence, say, the scope of any duty of care in negligence and suggest some perhaps indirect reference to, say, an environmental-monitoring requirement in any apparently relevant Directive.

D. *Direct and Indirect Standards*

Reference has been made previously in this paper to the impact of direct effect and vertical enforcement of EU legislation. Furthermore,

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116. *See* Cambridge Water Co. Ltd. V. Eastern Counties Leather, Plc., [1994] 1 All E.R. 53 (H.L. 1993).

117. Duddridge v. Secretary of State for Trade & Indus., [1995] Env. L.R. 151.

118. *See id.*

119. Electricity Act, 1989, sec. 3.

120. *See id.*

121. *Duddridge*, [1995] Env. L.R. at 151.

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reference has been made to the requirement that national law should be interpreted so that the objectives of relevant Directives are achieved. Bearing in mind the "vertical obligation" of the state (or state-related agencies) to comply with Directive requirements, those requirements can be regarded as "direct" standards. Allied to a finding of direct effects in favor of the plaintiff, there is some English authority in favor of damages or an injunction in a private tortious action.[122] Nevertheless, there appears to be less than outright judicial enthusiasm for an enforceable link between direct effects for an individual plaintiff and his ability to obtain damages for breach of statutory duty. On the other hand, where the axis shifts to the horizontal, there is of course no enforcement of EU law available against a private defendant. However, there is no reason why the court cannot adopt the indirect standards just referred to as a means of indirect enforcement of EU law in common law toxic tort litigation. One English commentator takes what may be a rather pessimistic view in saying that, even under Community law "it seems that national courts may refrain from 'interpreting' domestic law against its clear and intended meaning where to do so would breach the legitimate expectations of individuals."[123]

In reality it can be suggested that the judicial process here is far more subtle, as where, say, limit or even guide values are exposed to the variables that will go to make up liability in negligence or nuisance, for example. Furthermore, it must be assumed that in horizontal mode involving possible enforcement of indirect standards, an individual's legitimate expectations are that the court will adhere to vertical enforcement and will interpret and apply the common law according to accepted, national principles.

IV. ESTABLISHMENT, INTERPRETATION, AND ENFORCEMENT OF REGULATORY STANDARDS

This section of the Article concentrates on three issues: the drafting and transposition of EU directives, the data and information back-up for this legislative process, and the translation and interpretation of standards by national courts.

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122. *See, e.g.*, Garden Cottage Foods Ltd. v. Milk Mktg. Bd., [1983] 2 All E.R. 770, 786 (H.L. 1982), [1982] Q.B. 1114, 1125, 1984 App. Cas. 130, 155; Bourgoin S.A. v. Ministry of Agric., Fisheries & Food, [1985] 3 All E.R. 585, 615, [1986] Q.B. 716, 765; An Bord Bainne Co-operative v. Milk Mktg. Bd., [1988] 1 C.M.L.R. 605, 616 (Eng. C.A. 1987).

123. *See* STEINER, *supra* note 99, at 20.

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A. *The Drafting and Transposition of Directives*

Earlier in this Article the various purposes served by environmental Directives were referred to. These and the many other matters to be addressed in environmental Directives necessarily focus attention on the consequences of badly drafted legislation and resultant difficulties of implementation. This and related issues under the present heading were taken up and examined by the House of Lords Select Committee on the European Communities.[124] The report of the Committee points out that policies that are not solidly based on scientific knowledge or experimental data will be likely to be called into question when given practical effect. Where transposition is concerned, the report stresses the failure of many member states to introduce national rules giving effect to Directives within the required time-scale.[125]

Even when adopted, national legislation is often found to be defective either in form or in content. The Committee reported that at the end of 1990 the Commission had begun no less than 153 separate formal proceedings against member states for defective transposition.[126] According to the Committee, the process of transposition in the U.K. is further complicated by the national style of legislation. Traditionally, Parliamentary draughtsmen have been concerned with matters of precision and the intended effects of legislation, rather than the essential principles where precise application of those principles can be worked out subsequently. The Committee is critical of the failure of the EU to identify in sufficient detail, as a matter of policy, the essential objectives behind environmental legislation. As a result there tends to be a range of widely differing practical solutions among the member states.

B. *Data and Information Back-up for the Legislative Process*

Some of the foregoing criticisms were taken up by the same House of Lords Committee in a later report.[127] At the heart of a report on the new European Environment Agency is the recognition of a need for environmental information which can be regarded as reliable and "user-friendly" by law-makers, policy-makers, scientists, enforcers, and

124. Ninth Report, Session 1991-92: Implementation and Enforcement of Environmental Legislation.

125. *Id.*

126. *Id.*

127. Fifth Report, Session 1994-95: The European Environment Agency.

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others.[128] The Committee noted that a high priority in the Agency's work program has been given to improving comparability of data collection and reporting on air quality, air emissions, surface freshwater and groundwater quality, nature conservation, and marine (including bathing water) quality.[129] In the case of the U.K., it is clear that, compared with many other EU member states, information collection is very decentralized, necessitating a greater network management approach. At the EU level there is no power in the Agency to *compel* the production of information. In this respect, the founding Regulation is undoubtedly weak.[130]

A further challenge for the new Agency relates to the way in which the quality of data may be tested. For this the Agency is reported to be promoting standardization to ensure reliability and the production of better information.

C. *Translation and Interpretation of Standards by National Courts*

In crude terms, there will be occasions when a national court deems it appropriate to undertake its own translation and interpretation of EU legislative standards. On other occasions, following a reference to the European Court of Justice under Article 177 of the EC Treaty, the national court will be guided by the European Court's finding.[131] Prima facie the source of the dispute before the court is irrelevant. Whether there is a need for a reference to the European Court of Justice will usually depend on the centrality of the issue to the litigation as well as the complexity of the issue.[132] There are, however, other variables to take into account. At one end of the axis is the Directive which plainly prescribes a limit value for, say, air or water quality. Arguably, there is little difficulty in what appears to be a straightforward application of such numbers to the dispute in hand. However, this example undoubtedly oversimplifies the process, if only because many Directives will predicate such numerical values on monitoring and sampling, the requirements for which may have been incorporated into the relevant municipal legislation.

There is a rapidly developing awareness in the English courts of the factors and variables which are likely to affect the interpretation and

128. *Id.*
129. *Id.*
130. Regulation 1210/90/EEC, 1990 O.J. (L 120).
131. *See* STEINER, *supra* note 99, at 32-41.
132. *See id.* at 35.

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application of EU law. This awareness is relevant both to the application and enforcement of direct or indirect standards as those terms have been defined earlier in this Article by reference to the distinction between vertical and horizontal effects. Accordingly, there is an approach akin to that of judicial review in the court, whether the matter is state compliance with Directive requirements and standards or state liability in tort for failure to comply with those requirements. For example, in setting estuarine limits in compliance with the Directive on Urban Waste Water Treatment,[133] the High Court observes that

> it was intended that Member States should have a discretion in deciding how to establish outer estuarine limits.... [I]t can be implied from ... article 2(12) that salinity or topography have to be used in establishing those limits.... [T]hey are obviously relevant considerations.... In my judgment, the cost of treatment of the waste water is not a relevant consideration....[134]

These are clear public law issues. The extent to which they are likely to influence tortious liability of state agencies is rather more problematic in English law, primarily by reference to a judicial reluctance to constrain decision-making responsibilities devolved to public bodies.[135] Where private, toxic tort litigation is concerned it would seem to be clear that reliance on the foregoing public-law approaches is necessarily removed from the essential nature of that litigation. Such litigation normally would seem to involve reference to Directive standards and requirements only indirectly. For example, any indirect reference to Directive standards and requirements will be to, say, the relevant limit values or monitoring obligations which must be implemented and enforced by state agencies and be complied with by any private individual: a classic example of indirect effects.

V. CONCLUSIONS

It is much too ambitious to suggest that the setting of regulatory standards and limits can be or indeed should be the basis for common law liability in respect to so-called toxic torts. Occasionally among the recent

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133. Regulation 91/271/EEC, 1991 O.J. (L 135/40).

134. R. v. Secretary of State for the Env't, *ex parte* Kingston upon Hull City Council, [1996] Env. L.R. 248, 261-62 (Q.B. 1996), *cited in* THE TIMES, Jan. 31, 1996 (Harrison J.).

135. *See* X (Minors) v. Bedfordshire County Council, [1995] 3 All E.R. at 371, W.L.R. at 172 (H.L. 1995).

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cases examined, there may be an assumed link between such standards and limits. In *Margereson*, for example, the assumption was made without much inquiry or discussion into this basis for liability in nuisance.[136] The decisions in *Budden* and *Graham* appear to be contradictory until it is appreciated that operations beyond statutory limits (found either in statute, or in a permit, license, or other authorization) are not *per se* a foundation for tortious liability unless the vexed question of causation is in the plaintiff's favor.[137] None of the foregoing conclusions is capable of providing for the position in relation to negligence liability. Liability here focuses on process and procedural issues: operational standards, for example. The increasing trend towards crystallization of such standards in particular industries or trades may tend to render negligence at common law more difficult to prove.

Where causation is concerned, the court's freedom at common law is in being able to choose from a number of variables. Arguably, the establishment of causation against a background of statutory regulatory standards is a lottery in toxic tort litigation. In this and no doubt other areas of litigation, a matrix of variables allows a relative freedom of choice to the court. On the one hand, investigation of the balance of probabilities continues to beg questions about that essential balance and how the court will load that balance on the facts and evidence available. On the other hand, there is a second crucial question, about the adoption of the dominant/subsidiary cause approach, as opposed to the material-contribution approach. Both are very significant variables rendering the identification of causation a very tenuous process and under very full control by the court and its view of the merits.

There is no meaningful relationship between the requirements of common law toxic torts and EU regulatory limits and standards. The EU environmental Directives seek to achieve many and varied objectives, making any generalization about a relationship effectively impossible. An enormously complex picture is presented where, at best, it may be claimed that the common law could adopt a piecemeal and very selective approach to EU standards and regulatory requirements. Nevertheless, there is significant scope within EU law for indirect enforcement of standards and requirements through common law toxic tort litigation.

As to the realization of EU standards in aid of common law litigation discussed in this Article, any skepticism on the part of the court

136. *See supra* note 32 and accompanying text.
137. *See supra* notes 13 and 43 and accompanying text.

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about the reliability of the data and scientific evidence underpinning legislation may be well founded. Nevertheless, there seems to be no record of any toxic tort proceedings in which the reliability of EU standards and requirements has been a contentious issue.

The real challenge here, it may be suggested, is to reconcile the public-law oriented standards and requirements of the environmental Directives with the common law issues. At best this has been demonstrated to be a tenuous and ill-defined link which will only be developed and strengthened through a much greater, more coherent development of horizontal effects between individuals involved in toxic tort litigation.

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